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In the Supreme Court of the United States

OCTOBER TERM, 1973

IN THE MATTER OF THE APPLICATION OF CHERYL SPIDER DECOTEAU, PETITIONER

v.

THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This Memorandum is submitted in response to the Court's order of April 29, 1974, inviting the Solicitor General to express the views of the United States in this case concerning state jurisdiction over tribal Indians.

1. In December 1971, South Dakota brought dependency and neglect proceedings in the District County Court for the Tenth Judicial District of South Dakota against petitioner, an enrolled member of the Sisseton-Wahpeton Sioux Tribe. The State sought to

terminate her parental rights to her minor children, Robert Lee Feather and Herbert John Spider, also enrolled members of the Tribe. All of the incidents constituting the alleged dependency and neglect occurred within the exterior boundaries of the Lake Traverse Reservation, as established under the Treaty of February 19, 1867, 15 Stat. 505, 510 (Pet. App. A 2a; Pet. App. C 11a–12a). Approximately half of the incidents giving rise to the proceedings occurred on allotted Indian land, and the other half on land patented to non-Indians (Pet. App. A 2a; Pet. App. B 9a). Both children were placed in foster homes by the county court and remain in foster homes.

Article 10 of the Treaty of February 19, 1867 (Pet. App. C 12a) provides:

> The chiefs and head-men located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: Provided, That all rules, regulations, or laws adopted or amended by the chiefs and headmen on either reservation shall receive the sanction of the agent.

On August 4, 1972, Mrs. DeCoteau moved the county court to dismiss the proceedings and to return her

children to her on the ground that all the incidents giving rise to the proceedings involved Indians and occurred on the Reservation and that, therefore, the court lacked jurisdiction. This motion was denied.

Mrs. DeCoteau then petitioned the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That court denied the writ (Pet. App. B). While it found that Mrs. DeCoteau and the two children are enrolled members of the Sisseton-Wahpeton Sioux Tribe (Pet. App. B 8a), it ruled that the county court had jurisdiction to entertain the dependency and neglect proceedings because some of the incidents occurred on non-Indian owned land within the original boundaries of the Reservation, and, in the court's view, "the non-Indian patented land * * * is not within Indian Country" (Pet. App. B 10a). It also found "[t]hat lots or tracts of non-Indian patented or deeded land and lots or tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern over the entire area within the boundaries of the Lake Traverse Indian Reservation as established by the treaty of February 19, 1867" (Pet. App. B 9a–10a).

The South Dakota Supreme Court affirmed (Pet. App. A). It held that the effect of the agreement between the United States and the Tribe dated December 12, 1889, and the Act of March 3, 1891, 26 Stat. 989, 1036, ratifying that agreement was to separate from the Reservation all lands not patented to Indians.

The agreement, which is set forth in the 1891 Act (Pet. App. C 12a–17a), states that it is made under the authority of the Act of February 8, 1887, the Gen-

eral Allotment Act (Pet. App. C 13a). In the agreement the Indians of the Reservation—

> * * * cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made [Pet. App. C 14a].

The agreement also provides that the Indians shall receive, *inter alia*, $2.50 for each acre of land conveyed, to be used "* * * for the education and civilization of the said bands of Indians * * * as provided in section five [of the General Allotment Act of 1887] * * *" (*ibid.*).

The Act of March 3, 1891, ratifying the agreement, provides that the land ceded by the Indians shall be—

> Subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * * [Pet. App. C 20a].[1]

2. In our view the Supreme Court of the State of South Dakota has incorrectly held that the Lake Traverse Reservation no longer includes the lands now patented to non-Indians. We agree with the decision of the United States Court of Appeals for the Eighth Circuit in *United States ex rel. Feather* v. *Erickson*, 489 F. 2d 99, petition for a writ of certiorari pending, No. 73–1500 (Pet. App. D), that the effect of the 1892 Act was not to change the reservation boundaries but to permit homesteading of "surplus" lands within the Reservation in accordance with the General Allotment Act.

[1] We are informed by the Bureau of Indian Affairs that some 1340 acres remain in tribal ownership.

It is significant that the state court, in holding the patented lands excluded from the Reservation, did not consider this Court's recent decision in *Mattz* v. *Arnett*, 412 U.S. 481. There the Court explained that the purpose of the General Allotment Act was not to terminate reservations but to make allotments to individual Indians and to make unallotted lands available to non-Indians and that the opening of a reservation to homesteaders is not inconsistent with its continued existence (412 U.S. at 495). Here, both the agreement of 1889 and the 1891 Act specifically refer to the General Allotment Act as the authority under which the Reservation was opened to homesteading (Pet. App. C 13a, 19a). In light of these specific references to the General Allotment Act, and the opening of a "crazy-quilt" of unalloted land, there is no reason to presume that Congress intended to do more than carry out the purposes of that Act by allowing allotments to Indians and homesteading of surplus lands within the Reservation. See *Mattz, supra*, 412 U.S. at 494–497.

3. The Supreme Court of South Dakota held that because the 1891 Act provides for the *sale* of the surplus lands to the United States (expressly to be made available to non-Indians only under the homestead laws[2]) Congress' intent was to remove those lands

[2] Except for the 16th and 36th sections (see Pet. App. A 5a).

from the Reservation. That court contrasted the 1891 Act with others which provided that the United States was merely to act as trustee for a tribe in making surplus lands available to homesteaders.

Both forms of statute, with some variations in wording, were repeatedly used in opening reservations under the General Allotment Act. The earlier statutes tended to be written in terms of sale of unallotted land to the government for homestead purposes, while the later statutes often spoke of ceding unalloted land in trust to the government for homestead purposes.[3] In either case, however, especially where the lands, as here, were a "crazy-quilt pattern over the entire area" (Pet. App. B 9a), we think it erroneous to impute to Congress an intent to withdraw such lands from the reservation.

In viewing these statutes one must consider the purpose of a reservation and distinguish between ownership of tracts of land and the existence of a reservation. See *Seymour* v. *Superintendent,* 368 U.S. 351. An Indian reservation does not connote total Indian or

[3] Some examples of statutes ceding unalloted land to the government for homestead purposes are: Act of March 2, 1889, 25 Stat. 888 (Sioux); Act of March 3, 1891, 26 Stat. 1032 (Arickaree, Gros Ventre, Mandan); Act of March 3, 1891, 26 Stat. 1039 (Crow). Some examples of statutes using language of cession in trust for homesteading are: Act of January 14, 1889, 25 Stat. 642 (Chippewa); Act of April 23, 1904, 33 Stat. 302 (Flathead); Act of March 3, 1905, 33 Stat. 1016 (Shoshone-Arapaho). These are only two of the techniques employed by the government to allow homesteading *within* Indian reservations. They may be contrasted with statutes terminating reservations, or changing or diminishing their boundaries. See the examples of the latter given in *Mattz, supra,* 412 U.S. at 504.

federal ownership of the land within it. It refers to a geographical area within which the legislative authority of a tribe functions. *Worcester* v. *Georgia,* 6 Pet. 515; *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164. It also describes the area within which federal criminal jurisdiction applies, 18 U.S.C. 1151, and the area within which services of the Bureau of Indian Affairs are primarily directed, *Morton* v. *Ruiz,* No. 72–1052, decided February 20, 1974.

The effect of the decision of the South Dakota Supreme Court would be a virtually random, "crazy quilt" pattern of jurisdiction for the Tribe, the United States, and the State, dependent on the tenure of the land on which a particular act occurs—wholly contrary to the purpose of 18 U.S.C. 1151 in defining Indian Country for criminal purposes as including all land within the limits of an Indian reservation. If the reservation itself were defined so as to exclude all land patented to non-Indians, the very checkerboard jurisdiction that Act sought to avoid would be recreated. Compare *Seymour* v. *Superintendent, supra,* 368 U.S. at 357–358; *United States ex rel. Feather* v. *Erickson, supra.*

Moreover, Article 10 of the Treaty of February 19, 1867, *supra,* explicitly grants the Tribe the right of self-government, subject to the regulations of the Department of the Interior. "[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Pigeon River Co.* v. *Cox Co.,* 291 U.S. 138, 160. See also *Menominee Tribe* v. *United States,* 391 U.S. 404, 413. If the integrity of the Tribe as an inde-

pendent political community is to be preserved meaningfully, its jurisdiction as to members of the Tribe should not depend on the particular tract of land within the reservation on which an act arises. See *Seymour* v. *Superintendent,* 368 U.S. 351, 358.

There is no reason to believe that Congress, in choosing conveyance of "surplus" land to the United States to be conveyed only to homesteaders, rather than having the United States act specifically as trustee for the Tribe in conveying such lands to homesteaders, intended to alter the reservation boundaries and thereby create a "crazy-quilt" of federal and tribal (and state) jurisdiction.

4. The South Dakota Supreme Court also relied on a clause of the 1891 Act (not found in the 1889 agreement) stating:

> "That the lands * * * sold * * * shall * * * be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, *and be subject to the laws of the State wherein located* * * *" [Pet. App. A 5a, emphasis supplied].

It argues that the placement of the comma between "purposes" and "and" indicates that all the land, not just the school sections, would be subject to state jurisdiction. We agree that non-Indians on those lands (and their interests) are subject to state law, but submit that the most reasonable reading of this clause, in historical context and in light of the "crazy quilt" pattern, is that the land remains a part of the Reservation and that tribal authority over Indians on these portions of the Reservation remains undiminished, Moreover, as the court of appeals in *Feather* found, the clause does not give a clear indication of congressional intent to terminate or diminish the reservation, and any doubt should, of course, be resolved in favor of the Indians. *Worcester* v. *Georgia,* 6 Pet. 515, 582; *Carpenter* v. *Shaw,* 280 U.S. 363; *Squire* v. *Capoeman,* 351 U.S. 1, 6–7; *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 174. And here, since the 1891 Act ratified the 1889 agreement with the Tribe, it is to be construed according to the sense understood by the Indians. *Jones* v. *Meehan,* 175 U.S. 1, 11; *Marlin* v. *Lewallen,* 276 U.S. 58. Nothing in that agreement shows that the Tribe intended to give up anything more than beneficial title to some of its land. The natural understanding by the Tribe would be that it was selling only its property interest in land, not its right of self-government, particularly in view of the pattern in which allotments were being made.

5. The South Dakota courts have characterized the issue here as whether the incidents complained of occurred in "Indian country" as that term is defined in 18 U.S.C. 1151. That definition specifically concerns federal criminal jurisdiction, but is a useful guide to Congress' view of workable jurisdictional boundaries. We believe that this case, which is not a criminal case, rests on parallel but broader grounds: namely that in the absence of a clear congressional limitation, Indian tribes are self-governing political communities. In *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 168, this Court stated:

> * * * "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive * * *".

See also *Williams* v. *Lee*, 358 U.S. 217, 220:

> * * * Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them [footnote omitted].

And, if they are to govern effectively, the tribes also must have workable jurisdictional limits.

The petitioner and her children are enrolled members of the Sisseton-Wahpeton Sioux Tribe and the incidents involved here occurred within the confines of that Tribe's Reservation as established by treaty. The matters determined here are by treaty reserved to tribal and federal jurisdiction. The petitioner, therefore, is correct in her contention that the state courts were without jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted.

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